

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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1. The *O'Keefe* decision was not intended to apply to all federal employes regardless of circumstances.

Your petitioner argued before the courts of Pennsylvania that the decision in *Graves v. N. Y. ex rel. O'Keefe*, 306 U. S. 466, was not intended to apply to persons such as petitioner who are engaged in military, naval or defense work on behalf of the United States Government itself, particularly during a national emergency and particularly where the work is being performed in a federal area. Your Honorable Court is respectfully referred to pages 20 et seq. of the printed brief presented to the Superior Court in conjunction with the printed record submitted there.

Petitioner believes that the *O'Keefe case*, in overruling prior decisions which had declared all employes of federal instrumentalities immune from local taxation, must be strictly construed. Such a major change of constitutional doctrine, in derogation of well settled and universally accepted principles of fundamental law, should be subject to the same rules of construction as statutory changes of common law principles.

The *O'Keefe decision* should be confined to ordinary cases of federal employment. It should not extend, as required by the reasoning of the respondent and of the Pennsylvania courts, to all persons receiving federal compensation who either work in the City of Philadelphia or are domiciled in that city. Under their reasoning, a private in the United States Army, domiciled in Alabama but ordered to Philadelphia as part of an anti-aircraft detachment, would be required to pay to the City of Philadelphia a tax on his pay of \$21 per month for the privilege of protecting the City against destruction by invading bombers.

Or, a sailor in the United States Navy, technically domiciled in the City of Philadelphia but serving his Country on the high seas, would be subjected by the City to a tax on his meagre earnings. Similarly, a defense worker residing across the Delaware River in Camden, New Jersey, who is transported to work in the Philadelphia Navy Yard by a federally owned ferry and who does not step on Philadelphia soil or use the City's facilities, would be expected to contribute to the City's support.

Certainly this Court did not contemplate such outrageous consequences in deciding the *O'Keefe* case. The inevitable conclusion must be that there are certain exceptions to the general rule laid down in that decision, and that petitioner and persons similarly situated fall within those exceptions. The Superior Court's statement that Federal employes are in the same position as manufacturers and all others who supply war materials for profit ignores the entire history of the constitutional immunity of government workers from local taxation and the distinction above drawn. Long before the *O'Keefe* decision, it was recognized that contractors dealing with the Federal government are in an entirely different position from those who work directly for the Government and receive government salaries or wages.

## **2. Overruled decisions are not entirely inoperative.**

The authorities previously holding that all employes of Federal instrumentalities enjoyed a constitutional immunity from local taxes on their pay, while overruled by the *O'Keefe* case, cannot be considered as completely void and non-existent. The Pennsylvania courts have therefore erred in holding that those prior authorities are to be ignored. This Honorable Court is again referred to the printed brief in the Superior Court, wherein it was urged at pages 7 to 18 that the prior constitutional doctrine was

to be considered in construing the State tax law which was adopted in 1932, six years before the *O'Keefe* case was decided. The Superior Court misconceived your petitioner's argument and also the effect of an overruled decision by stating that the "reconsidered pronouncement will be considered as the law from the beginning," citing *People ex rel. Rice v. Graves, et al.*, 273 N. Y. S. 582. Examination of the latter case shows that there is great doubt on the effect of an overruled decision and that the case is scarcely authority for the proposition for which it is cited.

A Federal question is thus presented. The Pennsylvania courts have predicated their interpretation of State law on an erroneous conception of Federal law, and this warrants the intervention of the United States courts: *Standard Oil Co. of Cal. v. Johnson*, No. 1125, October Term, 1941, opinion by Mr. Justice Black, June 1, 1942. This recent decision involved a California tax levied on the sale of motor vehicle fuel, which the State courts had held applicable to sales at Army post exchanges. Because the State decision was based on the incorrect assumption that such exchanges are not government instrumentalities, this Court reversed the decision of the California court.

In like manner, the Pennsylvania interpretation should be reversed. This Court has never decided that an overruled decision is to be treated as completely non-existent. On the contrary, it is construed to be part of contracts drawn before the "reconsidered pronouncement" is rendered, and, under like reasoning, it should be construed as part of statutory enactments drawn before the subsequent decision. Hence, the prior law should be considered part of the Pennsylvania legislature's tax law of 1932. The Pennsylvania courts, in holding otherwise, have done so only because of their erroneous conclusion that the decisions which were overruled by the *O'Keefe* case in 1938 had no effect whatsoever in 1932.

**3. Act No. 819 of the 76th Congress prohibits the tax involved.**

In petitioner's brief before the Superior Court, at pages 18 to 20, the effect of Public Act No. 819, 54 Stat. 1060, 4 U. S. C. A. 14, is fully discussed. Petitioner urges that the Act prohibits local taxation on salaries earned in Federal areas prior to December 31, 1940. The Superior Court is in error when it holds that the Act is merely declarative of the law established in the *O'Keefe* case. It ignores the distinction between immunity based on employment by a Federal instrumentality and immunity based on exclusive jurisdiction over Federal territory. Federal areas, such as the Philadelphia Navy Yard, enjoy an immunity predicated on legislative grant from the Commonwealth of Pennsylvania and on the surrender of sovereignty to the Federal government. The only purpose of the above Act was to restore to the States a certain amount of surrendered sovereignty. It had nothing to do with the *O'Keefe* case or the doctrine therein expressed.

Some of the limitations on the permissive effect of that Act were recently carried out in *Query, et al., v. United States of America, et al.*, No. 619, October Term, 1941, opinion by Mr. Justice Black, June 1, 1942, where a South Carolina sales tax was held inapplicable to sales on Army post exchanges despite the Act.

Subsection (b) of Section 2 of the Act of 1940, in providing that the provisions of Subsection (a) shall apply only to income received after December 31, 1940, makes it evident that income received prior to that date is exempted. The income involved in the present case was all earned and received prior to that date.

#### 4. Congress may constitutionally exempt such income.

The Superior Court of Pennsylvania expresses doubt as to the power of Congress to exempt income received in a Federal area from local taxation. The exclusive character of Congressional jurisdiction over Federal areas should eliminate all doubt. If Congress considers it wise to immunize transactions or income accruing in Federal areas from local taxes, such action rests entirely within the discretion of Congress. Certainly a tax on income earned in a Federal area has some effect on the operation of the Federal area. If Congress wishes to eliminate that effect, it is entirely up to Congress; *Federal Land Bank of St. Paul v. Bismark Lumber Co., et al.*, 314 U. S. 95; see also *Alabama v. King & Boozer*, 314 U. S. 1, 8.

#### 5. Conclusion.

The opinion of the Superior Court of Pennsylvania shows that a review of a higher court was anticipated. The Supreme Court of Pennsylvania has not seen fit to review the case. The petitioner's sole resort, therefore, is the Supreme Court of the United States.

For the first time in the recorded jurisprudence of the United States of America, an attempt has been made to tax the pay of soldiers, sailors, and officers, while the country is at war. This tax has been imposed by a subdivision of a State. If such a tax is declared proper and legal by the courts, a most serious situation affects the Government of our country.

The question of the right of a municipality to tax citizens living in other States, while employed temporarily in that municipality, or while employed in Federal areas not under its control, is also of great importance.

The Supreme Court is respectfully requested to consider this tax legislation, as a whole, as it applies to Federal employes, officers, and serviceman, so that an authoritative expression on these matters may be obtained. The Pennsylvania courts have not adequately disposed of these Federal questions.

Respectfully submitted,

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